

**38 CFR Part 5****RIN 2900-AR21****Changes to Administrative Procedures Governing Guidance Documents****AGENCY:** Department of Veterans Affairs.**ACTION:** Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulations that govern the processes and procedures for issuing and managing guidance documents. These changes are necessary because an Executive order (E.O.) entitled “Promoting the Rule of Law Through Improved Agency Guidance Documents,” under which the regulations were originally issued, has been rescinded by an E.O. entitled “Revocation of Certain Executive Orders Concerning Federal Regulation.” This final rulemaking will implement changes to ensure that the processes and procedures comply with the mandates of the E.Os. entitled “Revocation of Certain Executive Orders Concerning Federal Regulation” and “Regulatory Planning and Review,” while also maintaining certain beneficial practices.

DATES: This rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Jeffrey Martin, Office of Regulation Policy and Management (00REG), 810 Vermont Avenue, NW., Washington, DC 20420, (202) 230-6402. (This is not a toll-free telephone number).

SUPPLEMENTARY INFORMATION: On November 13, 2020 (85 FR 72569), VA promulgated regulations in 38 CFR part 5 that established processes and procedures for issuing and managing guidance documents in accordance with E.O. 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents. However, E.O. 13891 was rescinded by E.O. 13992, Revocation of Certain Executive Orders Concerning Federal Regulation, which directed agencies to “promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing” the rescinded E.O. With E.O. 13891 rescinded, there is no requirement that VA have regulations that govern guidance documents. However, some of the requirements and processes contained in the regulations serve useful functions and are worth maintaining. Additionally, VA’s practices for guidance documents are still expected to comply with E.O. 12866, Regulatory Planning and Review. Therefore, to ensure VA’s practices regarding guidance documents comply with both E.O. 12866 and E.O. 13992, and continue certain beneficial practices, we make the following changes to the regulations in part 5.

Authority

We are removing the citation to E.O. 13891 in the authority for part 5 and replacing it with a citation to E.O. 12866.

Section 5.0 Purpose.

Section 5.0 is being amended by removing the language that discusses E.O. 13891.

Section 5.10 Definitions relating to guidance documents.

Section 5.10 is the definitions section. The section generally tracks the requirements that were outlined in E.O. 13891, as applied to VA. However, we are not making any changes to this section. We note that the definition of “guidance document” in § 5.10 largely correlates with the definition of “rule” from E.O. 12866, and the criteria

for what makes a guidance document “significant” are substantively the same as the criteria for rules under E.O. 12866.

Section 5.15 Procedures for issuing guidance documents.

Section 5.15 contains procedures for issuing guidance documents. Paragraph (a) applies to all guidance documents, while paragraph (b) is specific to significant guidance documents.

We are changing paragraph (a)(1) to state that each guidance document should include a disclaimer that the document does not have the force and effect of law and is not meant to bind the public in any way, rather than requiring such disclaimers to be included. This disclaimer is not required by E.O. 12866, and removing its requirement will minimize litigation risks associated with technical noncompliance. However, we are not entirely eliminating the use of the disclaimer because we believe it serves a beneficial purpose of clarifying the scope and limitations of guidance documents.

As with paragraph (a)(1), we are changing paragraph (a)(2) to state that each guidance document should include the listed information, rather than requiring the information to be included. We believe this change will provide a measure of standardization to guidance documents without requiring significant additional work and will also minimize litigation risks associated with technical noncompliance.

For paragraph (b), as with paragraphs (a)(1) and (2), we are changing the language to state that significant guidance documents should contain the disclaimer and listed information from paragraph (a), rather than requiring that they do so.

We are removing paragraph (b)(1) and renumbering the remaining paragraphs accordingly. This change will remove the requirement to conduct notice-and-comment procedures when issuing significant guidance documents. We acknowledge that providing the public an opportunity to participate in the process of issuing guidance documents would track the requirements from section 6(a)(1) of E.O. 12866 that

agencies provide the public meaningful participation and an opportunity to comment on proposed regulations. However, guidance documents are not regulations, and requiring notice-and-comment procedures is an onerous process that is not required by any law or other authority. Further, there are already less burdensome methods of allowing public participation. For example, § 5.20 creates a process for the public to petition for withdrawal or modification of guidance documents.

In redesignated paragraph (b)(1), we are removing the reference to E.O. 13891. And in redesignated paragraph (b)(3), we are removing the reference to E.Os. 13771 and 13777 as they have also been rescinded by E.O. 13992. We are also removing the phrase “for regulations and rules,” because as noted above, guidance documents are not regulations and thus are not subject to the same processes and requirements as regulations.

Section 5.20 Procedures for petition for the withdrawal or modification of a guidance document.

Section 5.20 contains a process for the public to petition for the withdrawal or modification of guidance documents, including the minimum amount of information that must be included in a petition. Although not mandated by any law or other authority, we are generally keeping this process in place as it is consistent with E.O. 12866’s focus on allowing public participation. However, to permit the Department increased flexibility in responding to petitions, we are changing the 90-day time limit to respond in paragraph (c) from a requirement to a goal that the agency will seek to meet.

Section 5.25 Guidance website.

Section 5.25 will continue to provide notice of the Department’s guidance document website. However, we are removing the second sentence from this section. This will remove the reference to E.O. 13891. Additionally, this will remove the

limitation on how the agency may use guidance documents not available on the website to increase the agency's flexibility in utilizing guidance documents.

Administrative Procedure Act

The Secretary of Veterans Affairs is publishing this rule without prior opportunity for public comment pursuant to 5 U.S.C. 553(b)(A) as this rule is a rule of agency organization, procedure, or practice, and thus is published as a final rule.

Paperwork Reduction Act

This rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. The regulations established by this rulemaking do not impose burdens or otherwise regulate the activities of any entities outside of VA. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review)

emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs (OIRA) has determined that this rule is not a significant regulatory action under E.O. 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

There are no Catalog of Federal Domestic Assistance numbers and titles for this rule.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), OIRA designated this rule as not a major rule as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 5

Administrative practice and procedure.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on April 15, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 5 as follows:

PART 5 – ADMINISTRATIVE PROCEDURES: GUIDANCE DOCUMENTS

1. The authority citation for part 5 is revised to read as follows:

Authority: 38 U.S.C. 501; E.O. 12866, 58 FR 51735, 3 CFR, 1993 Comp., p. 638.

2. Revise § 5.0 to read as follows:

§ 5.0 Purpose.

This part provides the Department of Veterans Affairs' (VA's) processes and procedures for issuing and managing guidance documents.

3. Amend § 5.15 as follows:

- a. Revise the first sentence of paragraph (a)(1);
- b. Revise the introductory text of paragraph (a)(2);
- c. Revise paragraph (a)(2)(vii);
- d. Remove paragraph (a)(2)(viii);
- e. Redesignate paragraph (a)(2)(ix) as paragraph (a)(2)(viii);
- f. Revise the introductory text of paragraph (b);
- g. Remove paragraph (b)(1);
- h. Redesignate paragraphs (b)(2) through (b)(4) as paragraphs (b)(1) through (3); and
- i. Revise newly redesignated paragraphs (b)(1) and (3).

The revisions read as follows

§ 5.15 Procedures for issuing guidance documents.

(a) *General.* (1) Each guidance document should clearly and prominently state that it does not bind the public, except as authorized by law or as incorporated into a contract. * * *

(2) Each guidance document should include the following information in the published guidance document:

* * * * *

(vii) A short summary of the subject matter covered at the beginning of the guidance document; and

* * * * *

(b) *Significant guidance documents.* VA will refer to the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, or the Administrator's designee, the question of whether a guidance document is significant. Significant guidance documents should contain the disclaimer and information described in paragraph (a) of this section. Additionally, unless the Administrator of OIRA, pursuant to review under E.O. 12866, and VA agree that exigency, safety, health, or other compelling cause warrants an exemption, the following additional procedures apply:

(1) The Secretary or a VA component head appointed by the President (with or without confirmation by the Senate), or by an official who is serving in an acting capacity as either of the foregoing, must approve any significant guidance document prior to issuance. This approval authority is not delegable.

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(3) Significant guidance documents must comply with the applicable requirements set forth in Executive Orders 12866, 13563, and 13609.

4. Revise § 5.20(c) to read as follows

§ 5.20 Procedures for petition for the withdrawal or modification of a guidance

document.

* * * * *

(c) VA will seek to provide a response to a petition within 90 days of receipt of the request.

5. Revise § 5.25 to read as follows

§ 5.25 Guidance website.

VA has a guidance website that contains, or links to, guidance documents that are currently in effect. The website can be found at the following address:

www.va.gov/orpm/va_guidance_documents.asp.